SUPREME

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 703

FRED MEYER, INC., a corporation, and FRED G. MEYER and EARLE A. CHILES, individually and as officers of said corporation, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD F. HOWREY
HAROLD F. BAKER
TERRENCE C. SHEEHY
1707 H Street, Northwest
Washington, D. C. 20006

GEORGE W. MEAD
1211 Public Service Building
Portland, Oregon

Attorneys for Petitioners

Of Counsel:

HOWREY, SIMON, BAKER & MURCHISON
1707 H Street, Northwest
Washington, D. C. 20006

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Fred Meyer, Inc., a corporation, and Fred G. Meyer and Earle A. Chiles, individually and as officers of said corporation, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on July 1, 1966.

CITATIONS TO OPINIONS BELOW

The initial decision of the hearing examiner (R. 18-55)[1] and the opinion of the Federal Trade Commission (R. 59-147) are not officially reported. The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, pp. 3a-32a, is reported at 359 F. 2d 351.

JURISDICTION

The opinion of the Court of Appeals (App. B, *infra*, pp. 3a-32a) was rendered on March 18, 1966. Rehearing was denied on June 8, 1966. The Court of Appeals' final judgment and decree (App. B, *infra*, pp. 33a-36a) was entered on July 1, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in holding that petitioner knowingly induced or received discriminations in price or promotional allowances, the Federal Trade Commission and the Court of Appeals disregarded and refused to follow the holding of this Court in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61 (1953), thereby placing buyers at their peril in seeking better prices, terms and conditions of sale and creating an open conflict between the Robinson-Patman Act and the broader antitrust policies of the Sherman Act.

2. Whether a broad, all-encompassing order may properly be entered in a case where the violations found involved a "unique" promotional scheme, were severely limited in number and extent, and the finding of violation was based upon admittedly weak and scanty evidence.

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[1] "R." refers to the record as printed for the use of the court below.

STATUTES INVOLVED

The statutory provisions involved are Sections 2(a), 2(d) and 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. §§ 13 (a), 13(d), 13(f) (App. A, *infra*, pp. 1a-2a), and Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. § 45 (App. A, *infra*, p. 2a).

STATEMENT

This petition seeks review of the judgment of the Court of Appeals for the Ninth Circuit which affirmed with modifications an order of the Federal Trade Commission directing petitioners to cease and desist from violating Section 2(f) of the amended Clayton Act and Section 5 of the Federal Trade Commission Act.

Corporate petitioner is an Oregon corporation which operates thirteen retail grocery supermarkets in the Portland, Oregon, area. The individual petitioners, Fred G. Meyer and Earle A. Chiles, are Chairman of the Board and President, respectively, of corporate petitioner.[2]

This is a so-called buyer case. In 1956, 1957 and 1958, during a four-week period beginning in September and ending in October, petitioner conducted a promotion called the "coupon book promotion" which consisted of the offering to consumers of special prices and terms of sale on certain featured products through the medium of coupon books. The coupon books, printed and distributed to consumers by petitioner, contained 72 coupon pages, each relating to a different

[2] Unless otherwise specified, the term "petitioner" herein refers to the corporate petitioner, Fred Meyer, Inc.

item. On redemption of these coupons, consumers received various benefits, such as free or sample items and reduced prices on multiple purchases.

To finance the coupon book promotions, petitioner invited participation of its suppliers; the participants received a page in the coupon book advertising the particular product chosen to be featured plus other advertising and promotional material. Suppliers participated under terms agreed upon prior to the promotion, including granting of allowances related to the volume of goods purchased by petitioner for resale during the promotion, payment of flat sum promotional allowances, and redemption of coupons submitted by consumers.

Count I of the Commission's complaint charged that petitioner violated Section 2(f) of the amended Clayton Act by knowingly inducing and receiving from its suppliers price discriminations prohibited by Section 2(a) of the Act. Count II of the complaint charged that petitioner violated Section 5 of the Federal Trade Commission Act by knowingly inducing and receiving from its suppliers discriminatory promotional payments prohibited by Section 2(d) of the amended Clayton Act.

Before the Court of Appeals petitioner argued, *inter alia,* that this Court's holding in *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61 (1953), precluded a finding that petitioner knew or should have known the prices or promotional allowances it received were violative of either Section 2(a) or Section 2(d) because of the substantially different quantities purchased by petitioner vis-a-vis the competing retailers; because of the basic conflict such a

finding would create between the Robinson-Patman Act and the Sherman Act; and because such a finding would render the "knowingly" requirement a nullity, would place a practicably impossible burden on any buyer in the day-to-day conduct of business, and would fatally impair—to the ultimate detriment of consumers—the ability of buyers to seek and obtain better prices, terms and conditions of sale.

Nonetheless, uncritically following the Commission's lead, the Court of Appeals seemingly disregarded the broader policy considerations and held, in effect, that initiation of a program by a buyer automatically places it on notice that whatever concessions are forthcoming are unlawful and transfers to it the virtually insurmountable burden of proving a negative, *i.e.*, lack of knowledge of illegality.

Petitioner also argued before the Court of Appeals that because of the severe penalties imposed for violation of Federal Trade Commission orders, any order entered must be limited to the actual practice found unlawful. While the Court of Appeals did so restrict the Section 2(f) order, it inexplicably failed to do so on the Section 5 count and entered an all-encompassing, unrestricted Section 5 order.

REASONS FOR GRANTING THE WRIT

1. The application of the Robinson-Patman Act, particularly with respect to buyers, presents retailers and wholesalers with a most difficult, confusing and frustrating legal problem. Presumably, as this Court indicated in *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61 (1953), there is still some room left in our regulated economy for bargaining between buyer and seller. Neither Congress nor this

Court meant, we are sure, to outlaw all haggling over price—a practice that has existed in the marketplace since long before the dawn of the Christian era. Indeed, this would be tantamount to attempting to outlaw basic human instinct.

However, the Federal Trade Commission and the court below in the instant case have, we believe, attempted this god-like feat, that is, to negate and destroy the human instinct to bargain over prices and allowances by placing on the buyer the burden of making sure that the seller does not give him too good a price.

This is a culmination of more than a decade of disregard by the Commission of the principles of *Automatic Canteen* which held that in a case against the buyer, the government has the burden of showing that the buyer knew that the seller could not justify the price differential under any statutory defense. The author of this petition is acutely aware of the fact that the Commission has barely paid lip service to these principles inasmuch as he briefed and argued *Automatic Canteen* before this Court some 13 years ago. Since certiorari was granted in that case, surely it should be granted here on the theory that *if* anyone is going to overrule the Supreme Court, it should be the Court itself and not the Federal Trade Commission.

In affirming the Commission's holding that petitioner knew or had reason to know that the concessions it received were unlawful, the court below relied on unsubstantial, weak and scanty evidence. It abdicated its conventional judicial function which is not blindly to accept the Commission's conclusions because of its allegedly superior expertise but rather to review the record as a whole and determine whether there is sub-

stantial evidence to support the agency finding. *Universal Camera Corporation* v. *National Labor Relations Board,* 340 U.S. 474 (1951).

The court below, while admitting that the quantity differences between petitioner's purchases for the four-week coupon promotion and those of the allegedly unfavored customers were "indeed large" (App. B, *infra,* p. 20a), refused to disturb the Commission's finding that petitioner knew the differentials could not be cost justified, relying on the tenuous grounds that the suppliers involved did not regularly grant quantity discounts, that petitioner paid the going price during the other eleven months of the year, that the allowances were solicited and that the concessions from two of the suppliers were large (*Id.* at 20a-21a). The Court of Appeals apologized for its conclusion in this respect by saying, "In summary, we consider that the evidence which supports the Commission's finding that Meyer had reason to believe that the discriminatory terms and prices it received were not cost-justified is weak but not insufficient" (*Id.* at 22a).

In connection with the defense of lack of competitive injury, the Court of Appeals affirmed the Commission's finding, without any reference whatsoever to the evidence (*Id.* at 23a), notwithstanding the fact that the Commission had held in a companion case that the nature of the concessions received by petitioner for the coupon promotions was not such as to create a reasonable probability of substantial injury to competition. See *Cannon Mills Company,* CCH Trade Reg. Rep., 1963-65 Transfer Binder, ¶16,878.

The evidence in this case was limited to transactions between petitioner and five suppliers—Burlington In-

dustries, Inc., Cannon Mills Company, Tri-Valley Packing Association, Idaho Canning Company and Philip Morris Company. The Court of Appeals held that petitioner's transactions with Tri-Valley and Idaho Canning were not illegal under Section 2(d) of the Clayton Act because there was no showing that petitioner and the allegedly disfavored customers (wholesalers) competed at the same functional level; that 2(d) did not require the sellers to offer proportionately equal benefits to wholesalers who were not in competition with petitioner. For the same reason, the transactions between petitioner and Philip Morris, insofar as they concerned United Grocers, a wholesaler, cannot be considered illegal (see App. B, *infra*, p. 15a, n. 11).

While the court's opinion did not discuss this functional level issue in connection with the Sections 2(a)-2(f) charge, the same reasoning necessarily applies since there was no showing that the retailers served by the unfavored wholesalers were "indirect" customers of Tri-Valley or Idaho Canning,[3] or that they competed with petitioner in the sale of products purchased from such wholesalers. While 2(a) does not in terms require that the favored and unfavored customers be in competition, it has long been the rule that in order to establish competitive injury there must be competition either between sellers in "first line" cases or between buyers in "secondary line" cases. In a "secondary line" case, such as this, "[s]ome competitive nexus between customers receiving the higher and the lower prices is a basic predicate of any conclusion of adverse effects at the customer level attributable to

[3] The complaint did not charge a 2(a) violation involving Philip Morris.

a seller's price differentials." Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962), p. 173. "If particular customer classes do not compete in their resale operations, the supplier's price differentials between them cannot impair competition with the recipient of the lower price" (*Id.* at 176).[4]

The transactions between petitioner and Cannon Mills cannot be considered illegal under either 2(a) or 2(d) because the hearing examiner, in a companion case against Cannon, held that the discount to petitioner—the identical discount challenged here—was fully cost justified (*Cannon Mills Company*, Initial Decision, CCH Trade Reg. Rep., 1963-65 Transfer Binder, ¶16,682), and the Commission later dismissed the complaint on the ground there was no injury to competition. *Cannon Mills Company*, CCH Trade Reg. Rep., 1963-65 Transfer Binder, ¶16,878.[5]

In view of the foregoing, the concessions which petitioner received from Tri-Valley, Idaho Canning and

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[4] See *Chicago Sugar Company* v. *American Sugar Refining Company*, 176 F. 2d 1, 10 (7th Cir. 1949); *Secatore's Inc.* v. *Esso Standard Oil Company*, 171 F. Supp. 665, 667-68 (D. Mass. 1959); and *Sano Petroleum Corp.* v. *American Oil Company*, 187 F. Supp. 345 (E.D.N.Y. 1960).

[5] The Commission, on page 75 of its brief before the Court of Appeals, after referring to the fact that the Commission had dismissed the complaint against Cannon Mills, says:

> Accordingly, while we rely upon Cannon Mills' discriminations as constituting violations of section 2(d), . . . we do not rely upon its price discriminations as constituting violations of section 2(a), or upon their inducement and receipt by petitioners as constituting violations of section 2(f).

Since the Commission dismissed the complaint on the ground of lack of injury to competition, we think it equally clear that it cannot rely on the Cannon Mills transaction to support the 2(d) charge.

Cannon Mills, and a portion of those received from Philip Morris, cannot form any basis for the Court of Appeals' decision that petitioner knew or had reason to know that said concessions were unlawful.

If the foregoing analysis is correct, and we believe it is beyond dispute, the court's finding that petitioner knew or had reason to know that the concessions it induced were unlawful must have been based solely on petitioner's transactions with Burlington Industries in connection with the 2(a) charge, and solely on transactions with Burlington and Philip Morris in connection with the 2(d) charge. In other words, the evidential score, at the very least, was 85 percent in petitioner's favor on the 2(a) charge and 70 percent in its favor on the 2(d) charge.[6]

Based on such a score card we do not think it right or proper for a court to infer knowledge of illegality, particularly when the remaining evidence was admittedly "weak" and "scanty" (See App. B, *infra,* pp. 13a, 14a, 22a).

In 1958, during the coupon promotion period, petitioner purchased from Burlington Industries in much greater quantities than the disfavored customer—4308 dozen hose versus 354 dozen, with a price differential of less than ten percent (CX 156, 158A-168B, 190-197)—yet the court below, relying on inferences and openly acknowledging that the Commission introduced no cost information or studies, held that petitioner had reason to believe that the supplier could have no cost justification defense. This holding, we

[6] On the 2(a) charge only one allegedly unfavored customer out of seven was left for consideration and under the 2(d) charge only two such customers out of seven were left for consideration.

suggest, is in conflict with the facts and with *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61 (1953).

With reference to the 2(d) charge involving Philip Morris, the court below observed that "[t]he evidence before the Commission on this point is indeed scanty" (App. B, *infra,* p. 13a).

This case, one of the most important that has ever confronted the food industry, where the government has the burden of proof, should not, we respectfully submit, be decided on "weak" and "scanty" evidence.

We do not see how it was possible for the Court of Appeals to disregard the *Cannon Mills* case, *supra.* Based on an elaborate cost study, which is discussed at length in his opinion, the hearing examiner found that the cost savings to Cannon arising from petitioner's larger quantity purchase was 12.135¢ per dozen while the discount was only 10¢ per dozen. Certainly, in the light of this affirmative finding of cost justification the court should not have inferred that petitioner *knew* or *should have known* that similar transactions with other suppliers, involving similar differences in quantities, could not be cost justified.

In view of the foregoing, the practical effect and meaning of the holdings of the Commission and the Court of Appeals is that initiation by a buyer of a program involving supplier participation automatically places the buyer on notice that whatever concessions or allowances are forthcoming are unlawful and transfers to it the practicably impossible burden of establishing a negative, *i.e.,* that the buyer lacked knowledge of illegality. Such a holding is in clear conflict with the spirit and the letter of *Automatic Canteen.*

While the Court of Appeals "buttressed" its opinion by quoting isolated phrases from *Automatic Canteen,* we are certain that a reading of the Supreme Court's decision in full text will demonstrate that the decision here is in conflict with the purpose and intent of the Supreme Court's holding, namely, that the Robinson-Patman Act should not be interpreted as "putting the buyer at his peril whenever he engages in price bargaining," that "[s]uch a reading must be rejected in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated" (346 U.S. at 73-74).

To paraphrase the Supreme Court in *Automatic Canteen,* if this decision against petitioner stands, it would render the "knowingly" requirement of the statute meaningless (*Id.* at 71), would comprehend any buyer who engages in bargaining with the seller (*Id.* at 72), and would put the Robinson-Patman Act in direct conflict with the broader antitrust policies of the Sherman Act (*Id.* at 74).

2. After finding violations of Section 2(f) and Section 5 as charged, the Commission entered an order which bore no reasonable relationship to the practice found unlawful; the order directed petitioner to cease and desist from knowingly inducing or receiving *any* discrimination in prices or promotional payments. Noting that under what is sometimes called the Clayton Finality Act, 73 Stat. 243 (1959), 15 U.S.C. § 21, the Commission's order, when it becomes final, subjects petitioners to a $5,000 penalty for each violation and, when the violation is continuing, to a $5,000 per day penalty while it continues, the Court of Appeals stated: "This, we think, requires that Commission orders be

more carefully framed than formerly, and that they no longer be a mere command to obey the statute" (App. B, *infra*, p. 30a), citing, *inter alia, Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, 367-68 (1962), and *Swanee Paper Corp.* v. *Federal Trade Commission*, 291 F. 2d 833, 837-38 (2d Cir. 1961), *cert. denied*, 368 U.S. 987 (1962).

Because the Commission's order amounted to nothing more than a broad command to obey the statute and was not properly related or limited to the practice found unlawful, the Court of Appeals found the order "subject to many of the strictures leveled by the courts at the orders involved in the foregoing cases" (App. B, *infra*, p. 32a), and directed modification of the order to embrace only the "scheme" found unlawful or "comparable ones" (App. B, *infra*, p. 32a).

As enforced by the Court of Appeals, the Section 2(f) part of the order prohibiting inducement and receipt of discriminatory prices, consistent with the court's opinion, is restricted to the knowing inducement or receipt of discriminatory prices "in connection with any promotional scheme consisting of distribution of coupons to and return of coupons by consumers in connection with the purchase by consumers of products offered for resale in retail outlets of respondent Fred Meyer, Inc., or in connection with any comparable scheme . . ." (App. B, *infra*, p. 34a). That portion of the order dealing with the Section 5 charge, *i.e.*, inducement or receipt of promotional allowances, however, wholly inconsistent with the court's opinion, prohibits the knowing inducement or receipt of promotional payments "in connection with any promotional scheme consisting of distribution of coupons to and return of coupons by consumers in connection

with the purchase by consumers of products offered for resale in retail outlets of respondent Fred Meyer, Inc., or in connection with any comparable program, *or in connection with any actual or purported promotion or special sale of particular products to be conducted by or on behalf of respondent Fred Meyer, Inc.* . . ." (App. B, *infra*, p. 35a; emphasis added).

Thus, despite its conclusion that under this Court's holding in *Federal Trade Commission* v. *Henry Broch & Co., supra*, as well as under lower court holdings, the Commission's order was unduly broad and should be limited to the scheme found unlawful or to comparable ones, and despite the fact that it so limited the Section 2(f) order, the court below entered and enforced an order under the Section 5 charge which applies, in the broadest possible terms, to any scheme or practice which might conceivably fall within the prohibition of the statutory terms as interpreted by the Commission. Petitioner seeks review of the judgment of the court below enforcing the Section 5 portion of the order.

The express reason that the Court of Appeals modified the Section 2(f) order applies with equal force to the Section 5 order. Under Section 5, subsection (1), of the Federal Trade Commission Act, 15 U.S.C. § 45 (*l*), petitioners are subjected to a $5,000 penalty for each violation and to a $5,000 per day penalty for a continuing violation. The finding of a Section 5 violation by both the Commission and the Court of Appeals was based upon essentially the same transactions as the Section 2(f) violation and both involved the same "unique" promotional scheme. Moreover, its finding of violation, the Court of Appeals repeatedly acknowledged, was based upon "weak" and "scanty" evidence

(See App. B, *infra*, pp. 13a, 14a, 22a). And, as pointed out above, the finding of violation by petitioner was based upon a finding of violation by only two suppliers and a single customer of each of those suppliers.

In light of this, it cannot be disputed that the violations by petitioner were not extensive or flagrant. Under such circumstances, this Court has indicated, a broad, all-encompassing order, is improper. See *Federal Trade Commission* v. *Mandel Bros., Inc.*, 359 U.S. 385, 392-93 (1959). See also *Tri-Valley Packing Association* v. *Federal Trade Commission*, 329 F. 2d 694, 709 (9th Cir. 1964).

Because of the nature of the violation charged in the instant case—a buyer case—the above considerations and principles are especially applicable. It is not only impracticable but virtually impossible for any buyer to obtain the detailed "knowledge" which would be required of it, under the Commission's and the Court of Appeals' interpretation, to assure that allowances it has received are lawful. At a minimum, the buyer would be required to determine specifically what other customers a particular supplier serves, what products are sold to that customer and whether that customer is a "competing" customer within the meaning of the statute. Additionally, the buyer would be required to determine exactly what allowances were being offered or granted to those "competing" customers, the time period during which they are being offered or granted and whether such allowances are "proportional". Apart from the potential Sherman Act problems presented by a buyer engaging in activity necessary to determine these specifics, the burden imposed would be harsh and virtually impossible to meet. If any order is proper, therefore, it must be limited to the practice actually found unlawful.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD F. HOWREY
HAROLD F. BAKER
TERRENCE C. SHEEHY
1707 H Street, Northwest
Washington, D. C. 20006

GEORGE W. MEAD
1211 Public Service Building
Portland, Oregon

Attorneys for Petitioners

Of Counsel:

HOWREY, SIMON, BAKER & MURCHISON
1707 H Street, Northwest
Washington, D. C. 20006

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